

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ERON HYPOLITE,

Plaintiff,

vs

“HOME DEPOT” AND HOME
DEPOT U.S.A., INC.,

Defendant.

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CIVIL ACTION NO. _____

JURY DEMANDED

DEFENDANT HOME DEPOT U.S.A., INC.’S NOTICE OF REMOVAL

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW Defendant Home Depot U.S.A., Inc. (“Home Depot”), who files this its Notice of Removal on the basis of diversity jurisdiction, and would show the Court as follows:

1. Home Depot is a defendant in a civil action pending in the 295th Judicial District Court of Harris County, Texas, entitled *Eron Hypolite vs. “Home Depot” and Home Depot USA, Inc.*; Cause No. 2010-31236 (hereinafter referred to as the “State Court Action”). True and correct copies of all process, pleadings, and orders served on Home Depot in the State Court Action are attached hereto as Exhibit “B,” as required by 28 U.S.C. § 1446(a).

2. The State Court Action was filed on May 18, 2010. Defendant Home Depot was served with Plaintiff’s Original Petition on May 25, 2010. Plaintiff’s Original Petition asserts a premises liability claim, alleging that Plaintiff was injured when she tripped and fell on a damaged part of the floor at a Home Depot store in Houston, Texas. Plaintiff’s Original Petition did not affirmatively reveal on its face that Plaintiff was seeking more than \$75,000.00. Plaintiff filed her First Amended Original Petition on July 15, 2010. None of the allegations in the First Amended Petition made it unequivocally clear and certain that the amount in controversy was more than

\$75,000.0

3. On July 21, 2010, Plaintiff served counsel for Home Depot with her Responses to Home Depot's Request for Disclosure. In Response to the Request for Disclosure (d) seeking the amount and method of calculating economic damages sought by Plaintiff, she itemized past medical expenses totaling over \$89,000.00 which she is seeking recovery of in this lawsuit. Furthermore, Plaintiff also stated in her responses that she will be seeking unspecified damage amounts for additional past medical expenses, future medical expenses, lost wages, physical impairment, and physical pain and mental anguish.

4. Considering Plaintiff's itemization of past medical expenses totaling more than \$89,000.00, along with her claims for other unspecified damage amounts for: (1) additional medical expenses in the past; (2) medical expenses in the future; (3) physical pain and mental anguish in the past and future; (4) physical impairment in the past and future; and (5) loss of income in the past and future, it is now clear that the amount in controversy exceeds \$75,000.00, exclusive of interest and costs. Prior to July 21, 2010, Plaintiff had not served Home Depot with any amended pleading, motion, order, or other paper from which it could be ascertained that Plaintiff was seeking more than the minimal jurisdictional limits of the Court. Accordingly, this notice is timely filed within thirty (30) days of Home Depot's receipt of first notice that this Court has jurisdiction over the subject matter of this case as required by 28 U.S.C. § 1446(b).

5. The United States District Court has original jurisdiction over this action based on diversity of citizenship among parties, in that the only named defendant is now, and was at the time the action was commenced, diverse in citizenship from Plaintiff. Specifically, Plaintiff is a citizen of the State of Texas.

6. Home Depot¹ is and was at the time of the filing of this action a corporation incorporated under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. Consequently, Home Depot is a citizen of the States of Delaware and Georgia, and the district courts of the United States have original jurisdiction over this action based on complete diversity of citizenship amongst and between the parties, in that Plaintiff and Home Depot are now and were at the time this action commenced, diverse in citizenship from each other.

7. The amount in controversy in the State Court Action is in excess of \$75,000.00, exclusive of interests and costs. Accordingly, the State Court Action is within the original jurisdiction of this Court pursuant to 28 U.S.C. § 1332, as it is a civil action wholly between citizens of different states, and, the amount in controversy is in excess of the Court's jurisdictional minimum for diversity cases.

8. Under 28 U.S.C. § 1446(a), venue of the removed action is proper in this Court as it is the district and division embracing the place where the State Court Action is pending.

9. Pursuant to 28 U.S.C. § 1446(d), Home Depot will promptly give written notice of the filing of this notice of removal to Plaintiff's counsel and will further file a copy of this Notice of Removal with the Clerk of Court of Comal County, Texas, where the action was previously pending.

10. **Jury Demand** – Home Depot hereby requests trial by jury on all issues and claims in this cause.

¹ Plaintiff also named "Home Depot" as a defendant in this case. Plaintiff has not attempted service on "Home Depot." However, there is no legal entity that is named "Home Depot" that operates stores in Texas. Rather, Home Depot is just the trade name that Home Depot U.S.A., Inc. uses in the operation of its stores. Furthermore, in his Original Petition, Plaintiff states "while on Defendant's premises of Home Depot located at 10707 North Freeway, Houston, Texas 77037..." As such, it is clear that Plaintiff is referring to the same entity with both named defendants. As "Home Depot" is a trade name of Home Depot U.S.A., Inc., there is only one defendant in this case, that being Home Depot U.S.A., Inc. Alternatively, as Home Depot is a non-existent entity, it is a nominal party, so its citizenship is not considered for removal purposes. Furthermore, its consent is not necessary as it has not been served and it is actually a party, it is a nominal party.

WHEREFORE, Home Depot hereby removes the case styled *Eron Hypolite vs. "Home Depot" and Home Depot USA, Inc.*; Cause No. 2010-31236 from the 295th Judicial District Court of Harris County, Texas, and respectfully requests that this Court assume full jurisdiction of this proceeding for all purposes as if originally filed in this Court, including but not limited to issuing any orders necessary to stay proceedings in the State Court Action.

Respectfully submitted,

By: /s/ Arthur K. Smith

Arthur K. Smith
Attorney-in-Charge
Texas State Bar No. 18534100

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ATTORNEYS FOR DEFENDANT
HOME DEPOT U.S.A., INC.

CERTIFICATE OF SERVICE

On the 23rd day of July, 2010, a true and correct copy of the above and foregoing pleading was served upon counsel for Plaintiff via certified mail, return receipt requested, in accordance with Rule 5 of the Federal Rules of Civil Procedure.

/s/ Arthur K. Smith

Arthur K. Smith